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No. 913

# In the Supreme Court of the United States

OCTOBER TERM, 1957

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THE OHIO POWER COMPANY, PETITIONER,

*v.*

THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims (Pet. 1a-5a) is reported at 157 F. Supp. 158.

### JURISDICTION

Taxpayer's motion in the court below to vacate its order of July 12, 1957, dismissing the petition pursuant to the mandate of this Court, was denied December 4, 1957. (R. 125.)[1] The petition for writ of certiorari was filed February 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] References to the original record on file in this proceeding are designated as "R. ——." References to the original record filed in this Court in No. 312, October Term, 1955, are designated as "1955 R. ——."

QUESTION PRESENTED

Whether, this Court having earlier reversed the judgment of the court below in this case on the authority of two recent decisions, the court below was required on remand to consider an allegedly new ground which petitioner had unsuccessfully presented to this Court in attempting to distinguish the two cases which this Court found to be controlling.

STATEMENT

On a prior petition for writ of certiorari in this same proceeding, *United States* v. *Ohio Power Co.*, 353 U.S. 98, the judgment of the Court of Claims in favor of taxpayer was reversed on authority of *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313. This Court's decision and mandate read in part as follows:

> On June 11, 1956, we unanimously vacated *sua sponte* our order of December 5, 1955 (350 U.S. 919), denying the timely petition for rehearing in this case (351 U.S. 980), so that this case might be disposed of consistently with the companion cases of *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313, in which we had granted certiorari the same day, *viz.* June 11, 1956. 351 U.S. 981. If there is to be uniformity in the application of the principles announced in those two companion cases, the judgment below in the instant case cannot stand. Accordingly we now grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Claims on the authority of *United States* v. *Allen-Bradley Co.*, *supra*, and *National Lead Co.* v. *Commissioner*, *supra*.

> * * * The cause is reversed; and the same is hereby remanded to the United States Court of Claims. April 1, 1957. * * *

Thereafter the Court of Claims on July 12, 1957, entered an order vacating the earlier judgment in favor of taxpayer and dismissing its petition. (R. 1.)

Taxpayer then filed a motion requesting the Court of Claims to vacate its order of July 12, 1957, to grant taxpayer a new trial, and *leave to file an amended* petition, to raise what it stated to be a new issue. (R. 9-10.) This issue was stated in its motion (R. 13) as follows:

> Could the War Production Board retroactively apply its new excess war cost rule to the certification of plaintiff's "Tidd Project Emergency Facility," the construction of which had commenced prior to October 5, 1943, when the Executive Order from which the Board derived its power and the duly adopted regulation authorizing the excess war cost rule both expressly prohibited their application to construction commenced prior to such date?

The Court of Claims concluded that the issue had been argued by the parties in this Court, and had in effect been resolved by the Court's decision holding the case to be controlled by *Allen-Bradley* and *National Lead*. Accordingly, the court below denied taxpayer's motion. (R. 128.)

## ARGUMENT

The Court of Claims properly refused to permit taxpayer to reargue before it a matter previously litigated in, and decided by, this Court.

Taxpayer contends that (Pet. 6) "It is petitioner's position that such alternative ground was not—and could not have been—decided by this Court, and that petitioner has never been heard on this issue." The Court of Claims rejected this contention with the following observation (Pet. 4a):

> Because of the Government's persistence in its attack upon the plaintiff's judgment, the plaintiff had the opportunity, of which it took advantage, of attempting to distinguish *Allen-Bradley* and *National Lead*, from its own case, after those cases had been decided by the Supreme Court. As the plaintiff's case then stood in the Supreme Court, if the Court had been impressed by the plaintiff's attempted distinction, it could have denied the Government's pending petition for a rehearing, and let its former denial of *certiorari* stand. Or it could have granted *certiorari* and affirmed the judgment with an opinion approving the plaintiff's attempted distinction of its other decisions. In fact it granted *certiorari* and reversed our judgment with an order putting the plaintiff's case on all fours with *Allen-Bradley* and *National Lead*.

Another possible alternative, implicitly rejected by this Court, would have been to vacate the judgment of the Court of Claims and to remand for consideration of the taxpayer's argument as to the alleged distinction from *Allen-Bradley* and *National Lead*. The Court, however, reversed on the merits, holding that the latter cases were indistinguishable and controlling. It is this adjudication on the merits by this Court that petitioner

asked the court below to reconsider. The Court of Claims correctly declined to do so.

The extent to which taxpayer was heard in this Court on the issue which it seeks to litigate before the Court of Claims is clearly revealed by the briefs and motions filed by the parties in No. 312, October Term, 1955.

The issue taxpayer would present was first raised by it in its "Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing," filed in response to the Government's motion for leave to file a second petition for rehearing of denial of certiorari, prompted by an asserted fresh conflict caused by the opinion of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161. In its brief (pp. 19-22) taxpayer asserted that the *National Lead* case was distinguishable on the very same grounds it now seeks to urge before the Court of Claims.

On June 11, 1956, this Court vacated its earlier denial of the Government's timely petition for rehearing "so that this case might be disposed of consistently with the companion cases of *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313, in which we had granted certiorari the same day, *viz.* June 11, 1956." 353 U.S. 98.

Taxpayer then filed an unsuccessful "Motion to Vacate Order of June 11, 1956, and to Dismiss Petition for Rehearing Filed November 10, 1955" (hereinafter called "Motion to Vacate"). In Point II, spanning pages 20 through 44 of its motion, taxpayer asserted that the order of June 11, 1956, should be vacated because, it contended, no decision of this Court in

*National Lead* or *Allen-Bradley* could adversely affect the decision in its case. The grounds for this allegation were stated to be differences in controlling facts and applicable Regulations (see particularly pp. 21-34)—the same argument now renewed here. In a "Reply Memorandum" taxpayer again (pp. 5-6) asserted this argument.

*United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313, were decided on January 22, 1957. Thereafter, on January 28, 1957, this Court entered an order requesting taxpayer to file a response to the Government's petition for rehearing. 352 U.S. 987. In response thereto taxpayer filed with this Court a "Brief of Respondent in Opposition to Petition for Rehearing." In the heading of its brief entitled "Questions Presented," taxpayer acknowledged that the *Allen-Bradley* and *National Lead* decisions had put to rest any issue as to whether the War Production Board had authority under Section 124 of the Internal Revenue Code of 1939 to certify only part of the cost of an emergency facility. The brief continued as follows (pp. 2-3):

> Accepting these decisions with respect to WPB's power to promulgate and apply this regulation, however, the additional and controlling issue presented here is the applicability of the regulation itself. There are also presented wholly unrelated procedural questions involving the timeliness of the Government's petition for a writ of certiorari and the finality of the denial by this Court of the Government's petition for rehearing. The questions now presented here are:

**1. Even though WPB had statutory authority to promulgate its excess war cost regulation of October 5, 1943, did it erroneously apply the regulation to Ohio Power's facility, whose construction was commenced about two months prior to the adoption of the regulation, where that regulation and the Executive Order transferring certifying authority to WPB specifically provided that the regulation should not be applied to construction commenced prior to October 5, 1943?**

* * * * *

[Questions 2 and 3 raising procedural issues are omitted]

None of these questions was involved in either *Allen-Bradley* or *National Lead.*

Thus, the first question taxpayer posed was whether or not this case was distinguishable from *Allen-Bradley* and *National Lead.* The question was extensively argued on pages 6-15 of their brief.[2] The pertinent portion of

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[2] Argument I of taxpayer's "Brief of Respondent in Opposition to Petition for Rehearing" is entitled:

I. The Amended Regulations of October 5, 1943 did not apply to the Tidd Project because construction thereof had commenced before that date.

A. The Amended Regulation of October 5, 1943 promulgating the Excess-War-Cost Rule was never intended to apply and by specific language in the amended regulation as well as Executive Order 9406 did not apply to construction commenced prior to October 5, 1943.

B. This Court's decisions in *Allen-Bradley* and *National Lead* are inapplicable because the question here is not the statutory authority of the WPB but whether the Board acted here in violation of E.O. 9406 and the Amended Regulation of October 5, 1943.

the answering "Memorandum for the United States in Support of Rehearing" which denied that the cases were distinguishable is set forth as an appendix to this brief, *infra*, pp. 12-15.

It was with this background that on April 1, 1957, certiorari was granted and the case reversed on authority of *Allen-Bradley* and *National Lead*. 353 U.S. 98.

Because this Court in its *per curiam* opinion did not expressly mention the asserted distinction between the cases, taxpayer says it follows that the point was not considered by this Court. It is clear from the record, however, that this Court decided the instant case was indistinguishable from, and controlled by, *Allen-Bradley* and *National Lead* after receiving the parties' briefs on the very point. To conclude the chronological record, it should be noted that on April 25, 1957, taxpayer filed a "Motion for Consideration by the Full Court and Petition for Rehearing." This motion (p. 14) requested reconsideration and alternative relief as follows: (1) Denial of certiorari or (2) a rehearing by the full Court on the effect on *Ohio Power* of the decisions in *Allen-Bradley* and *National Lead*, or (3) amendment of the judgment of April 1, 1957, to provide for remand of the cause to the Court of Claims to consider the claimed distinctions. The discussion of points 2 and 3 cover pages 6-14 of the "Motion for Consideration by the Full Court and Petition for Rehearing." The motion was denied. 353 U.S. 977. Taxpayer's present petition for writ of certiorari amounts to no more than a belated second petition for rehearing and reconsideration as to alternative (3).

Taxpayer seeks to explain away the consequences of its earlier argument of the issue before this Court

by claiming that the prior argument was limited solely to its efforts to oppose certiorari and not to the merits of the cause once certiorari was granted. This is true, taxpayer says, because it made a new argument for the first time in this Court and travelled outside the record to do it. As previously demonstrated, taxpayer's argument was not so narrowly limited. As stated on page 7 of the "Motion for Consideration by the Full Court and Petition for Rehearing":

> Respondent has urged and continues to urge that even though the certifying agency has statutory authority to promulgate its excess war cost regulation of October 5, 1943, as this Court has now held in *Allen-Bradley* and *National Lead*, this regulation was inapplicable to Ohio Power Company's facility.

Moreover, the argument did not require taxpayer to travel outside the record. Taxpayer's argument, that notwithstanding the statute the War Production Board exceeded its authority in limiting the amortization to 35 per cent, requires proof of but two things: (1) The date construction commenced, and (2) the Regulations then applicable. Neither required a new trial to establish.

The date construction commenced is in the record. In its earlier briefs filed in this Court taxpayer consistently gave the date for commencement of construction as August, 1943, citing page 21 of the record. (See "Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing", p. 21; "Motion to Vacate," pp. 22, 23; "Brief of Respondent in Opposition to Petition for Rehearing," pp. 4, 5, 10.) The record reference is to an affidavit of one Howard

G. Dernberger, an assistant treasurer of the taxpayer, filed with the motion for summary judgment which does support the allegation. The Government's counter motion for summary judgment stated it would rely upon the affidavits. (1955 R. 33-34.)

As to proof of the limitation placed on the statutory authority by Regulations, this Court, of course, will take judicial notice of rules and regulations of administrative bodies. *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481; *Tucker* v. *Texas*, 326 U.S. 517.

Along with its "Brief of Respondent in Opposition to Petition for Rehearing", taxpayer filed an appendix of 60 pages setting forth the administrative Regulations relied upon. The Government did not object to the propriety of the argument nor dispute the facts (although it disagreed with the interpretation of them). Indeed, these matters were properly of record aside from the doctrine of judicial notice for they were incorporated expressly or by reference in the affidavit of counsel in support of the Motion for Summary Judgment. (1955 R. 27-31.)

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1958.

APPENDIX

## EXCERPT FROM MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF REHEARING IN THE SUPREME COURT OF THE UNITED STATES (pp. 2-6, No. 312, *United States of America* v. *The Ohio Power Company*, October Term, 1955)

The taxpayer contends, however, that this case is distinguishable from *Allen-Bradley* and *National Lead*; that those decisions are not controlling; and that "the decision below is plainly correct * * * and should not be disturbed."

The Government submits that the taxpayer's attempt to distinguish *Allen-Bradley* and *National Lead* is clearly futile. The asserted distinctions are, on their face, without significance. In essence, taxpayer claims that, because it began the construction of the facilities prior to October 5, 1943, and because paragraph 3(a) of Executive Order 9406, 8 Fed. Reg. 16955, provided that applications with respect to such facilities should be governed by the Regulations of the Secretaries of War and Navy in effect prior to October 5, 1943, this case is essentially different from *Allen-Bradley* and *National Lead*, where the construction began after October 5, 1943. But this factual difference is of no consequence unless the taxpayer is also correct in its basic contention of law that the Board's action in issuing a partial certificate was in violation of the governing Regulations and the Executive Order.

It is now datum, as a result of the Court's decisions in *Allen-Bradley* and *National Lead*, that the statute granted authority to issue partial certificates. Taxpayer must therefore attempt to sustain the burden that, though authorized by statute, the certifying officials had, by Regulations, precluded themselves from exercising this authority prior to the promulgation of

Executive Order 9406 and, if they had not, that the Executive Order prohibited them from exercising their statutory authority in situations where construction had begun prior to October 5, 1943, and where, as here, the application for a certificate was not filed until later (November 16, 1943). For the reasons briefly summarized below, we think it abundantly clear that this burden has not been, and cannot be, met.

(a) From the very beginning, those charged with responsibility recognized their statutory authority to issue partial certificates in appropriate circumstances where they concluded that only part of the cost of a particular facility was necessary in the national defense. Thus, Section 5(a), War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Reg. 4233 (1942) stated that necessity certificates were conclusive evidence that the facilities were necessary in the interest of the national defense "up to the percentage therein designated * * *." And, except for the inclusion of the specific percentage, the certificate in this case, as in *Allen-Bradley* and *National Lead*, follows the identical language of Section 5(a) of these Regulations, which were cited by this Court as showing that the administrative officials had consistently interpreted the statute as authorizing such partial certificates. (*Allen-Bradley*, slip opinion, p. 4, footnote 2.) And the Treasury Regulations, issued soon after the enactment of the Second Revenue Act of 1940, made it crystal clear that the administrators assumed that they possessed and would exercise the authority to issue partial certificates. Section 19.124.6, as added by T. D. 5016, 1940-2 Cum. Bull. 119. These Regulations, too, were cited for the same proposition in the *Allen-Bradley* opinion (*ibid.*).

The taxpayer does not point to a single provision of the War and Navy Department Regulations, which

govern this case, to document its assertion that the partial certification here was "in the teeth" of these Regulations. The provisions relied on by this Court conclusively show the contrary, namely, that the administrators did not voluntarily restrict themselves from exercising the full measure of authority granted by Section 124(f). Whether that authority had or had not been exercised prior to October 5, 1943, in situations where post-war utility appeared probable is not important here, since it depended on the factual circumstances then existing; the only question is whether the legal authority to do so existed. It would be extraordinary to find evidence that such authority, vested by statute, had been voluntarily relinquished or waived by the responsible administrators; and such evidence would doubtless have to be clear and specific to warrant so exceptional a conclusion. But taxpayer can find none.

(b) There is similarly no basis for the taxpayer's assumption that Executive Order 9406 was intended to preclude the certifying officials, in passing on future applications filed with respect to facilities which were then under construction, from issuing partial certificates when they deemed that the circumstances, including the probability of post-war utility to the taxpayer, warranted such action. The Executive Order contains no prohibition, explicit or implied, to that effect; and here too it may reasonably be presumed that if there had been an intent to curtail existing authority, it would have been clearly stated. The fact that subparagraph (a) and (b) of paragraph 3 of the Executive Order drew a distinction between facilities whose construction was begun before October 5, 1943 and facilities constructed after that date, does not warrant the taxpayer's assumption that the certifying officials would thereafter be precluded from issuing partial certificates in the former situation and would only be per-

mitted to do so in the latter. Obviously, the distinction was drawn in the Order because thereafter no certificates would be issued for proposed facilities except *in advance* of construction, a requirement which, out of fairness, was not to be imposed where, in reliance on prior regulations, construction had been begun prior to application for a certificate.

The only assurance which the Executive Order gave to the taxpayer was that, since it commenced construction of the project prior to October 5, 1943, a timely, subsequent application would be considered on its merits. Neither before nor after the Executive Order did the taxpayer have any assurance that the project already under construction would qualify for certification or that its full cost would be certified as necessary in the interest of national defense. The Order left the administrators wholly free to make such determination as the particular circumstances required: they could issue a certificate for the full cost, or none at all, or, as in this case, for only that part of the cost which they deemed necessary in the interest of the national defense.[1]

In sum, the present case is indistinguishable in its pertinent facts from *Allen-Bradley* and *National Lead*.[2]

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[1] Although the parties made no point of this, it should be noted that in *Allen-Bradley* one of the "partial" certificates was subject to the same paragraph of Executive Order 9406 which governs this case. (See R. 5-6 in No. 78, this Term.)

[2] Even if the distinctions asserted by the taxpayer are germane, it would not follow, as the taxpayer tacitly assumes, that it would be entitled to amortize the full cost of the property, in view of the fact that there never was an administrative determination that the full costs were necessary in the interest of the national defense. The Government's argument in this respect was sustained by the Second Circuit in the *National Lead* case, but in view of the disposition of the cases made by this Court was not reached on review here.

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